IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 89 OF 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
M/S. IDEAL SHEET METAL STAMPINGS & PRESSING P. LTD. - Opponent(s)

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Appearance :
MRS. MONA BHATT for MR. MANISH R. BHATT for Applicant(s).
None for Opponent though served.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 12/09/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

The Income Tax Appellate Tribunal, Ahmedabad

Bench “B”, at the instance of the Revenue, has referred the following question under Section-256(1) of the Income Tax Act, 1961 (“the Act” for short) to this Court for its opinion, which arises out of I.T.A. No. 1616/Ahd/1991 relating to Assessment Year 1986-87:

> *“Whether the Appellate Tribunal is right in law and on facts in the disallowance of Rs.6,55,595/- being the amount of excise duty collected by the assessee but not paid under the provisions of sec. 43-B of the I.T. Act?”*

2. The short facts necessary for disposal of the present Reference are that the Assessee, who was engaged in the business of manufacture of textile machinery parts and accessories and auto spare parts, maintained mercantile system of accounting and for the Assessment Year 1986-87, the Accounting Year ended on 31st December, 1985. During the course of the assessment proceedings, the Assessing Officer noted that the Assessee had collected excise duty of Rs.7,75,655/-, but, had not paid the same to the Government, therefore, he required the Assessee to explain the income of the Assessee in view of the provisions of Section 43-B of the Act. The Assessee contended that since the excise was collected and kept separately in the excise deposit account in the books of accounts and as in the dispute between the Assessee and

the Government, the High Court of Gujarat had stayed its payment, the provisions of Section 43-B of the Act were not attracted. The submission made by the Assessee did not find favour with the Assessing Officer. Placing reliance upon the judgements of the Supreme Court in the case of ***Chowringhee Sales Bureau P. Ltd. vs. Commissioner of Income-Tax, West Bengal***, [***87 I.T.R. 542***], and in the case of ***Sinclair Murray And Co. P. Ltd. vs. Commissioner of Income-Tax, Calcutta***, [***97 I.T.R. 615***], the Assessing Officer held that the excise duty so collected was part of the trading receipt and as such, that should be part and parcel of the Assessee's income. The Assessing Officer disallowed Rs.6,55,595/-. Before him it was claimed by the Assessee that an amount of Rs.1,20,060/- was refunded to one of the parties on furnishing of the Bank Guarantee.

2.1 In appeal, the Commissioner of Income-Tax (Appeals) held that the excise collected and kept under a separate account and shown as liability in the Balance Sheet was nothing but the trading receipt of the Assessee. He, placing his reliance upon the judgement in the matter of ***Chowringhee Sales Bureau*** (*supra*), observed that the provisions of Section 43-B were very much applicable to the facts of the case. He, accordingly,

confirmed the addition.

2.2 At the instance of the Assessee, the matter went to the Tribunal, which held that the receipt of excise from the purchasers was, in fact, the deposit by or on behalf of various customers, to whom the Assessee had sold the aforesaid items. The Tribunal also held that as there was stay by the High Court, the Assessee was not required to pay to the concerned Department and if he was required to refund the money to the customers, then, in such a case, the amount would partake the character of deposit.

The Tribunal also observed that the provisions of Section 43-B of the Act would not be attracted.

3. Mrs.Bhatt, learned Counsel for the Revenue, submits that the Tribunal has illegally ignored the above referred two judgements and wrongly held that the said judgement would not apply to the facts of the case. Her submission is that a fair reading and understanding of the judgement in the matter of ***Chowringhee Sales Bureau*** (*supra*) would make it clear that whenever the Assessee-Trader recovers any amount towards the sales tax, then, that would be treated to be part of the sale price and if

the said sales tax is not paid by the said trader to the concerned Department, then, the sales tax, which is the part of the sale price, would be included in the income and, therefore, likewise, the price in the present case which is inclusive of the excise duty would be the sale price for all practical purposes and if the trader does not pay the said money to the concerned Department, then, it would be the trade receipt, inclusive in the income, and under such circumstances, because of non-payment of the said amount, the provisions of Section 43-(B) of the Act would apply with full force.

3.1 She has also placed reliance upon an unreported judgement of this Court in Tax Appeal Nos.193 of 2003, 194 of 2003 and 8 of 2004 in the matter of ***M/s.Mugat Dyeing & Printing Mills vs. A.C.I.T.***, decided by the Division Bench of this Court on 2nd February, 2006.

4. In the matter of ***Chowringhee Sales Bureau*** (*supra*), the appellant before the Supreme Court, a private company, was dealing in furniture and was also acting as an auctioneer. In respect of the sales effected by it as auctioneer, the said appellant realised during the relevant period, in addition to the commission, Rs.32,986/- as sales tax. The said amount was credited

separately in its account books under the head “sales tax collection account”. The said appellant did not pay the amount of sales tax to the actual owner of the goods, nor did it deposit the amount realised by it as sales tax in the State Exchequer, because it took the position that the statutory provision creating that liability upon it was not valid, or refund it to the persons from whom it had been collected. In the cash memos issued by the appellant to the purchasers in the auction sales, the said appellant was shown as the seller.

The Supreme Court, after taking into consideration the provisions of the Sale of Goods Act, and the local Sales Tax Act, observed: (i) that the sum of Rs.32,986/- realised as sales tax by the said appellant in its character as an auctioneer formed part of the trading or business receipts; (ii) that the fact that the appellant credited the amount received as sales tax under the head “sales tax collection account” did not make any material difference. The Supreme Court further observed that it is the trade nature and quality of the receipt and not the head under which it is entered in the account books as would prove decisive. If a receipt is a trading receipt, the fact that it is not so shown in the account books of the Assessee would not prevent the

Assessing Authority from treating it as trading receipt. However, the Court also observed that in case the Assessee is required to pay the amount to the Government, then, the Assessee would, of course, be entitled to claim deduction of the amount as and when it is so paid. The Supreme Court observed that sales tax, along with real price, would constitute sale price and under such circumstances, it would be a trading receipt. If the amount recovered under the head of sales tax is really paid by the Assessee to the State Exchequer, then, it would be entitled to deduction, but, in case, it does not pay it, then, it would amount to a trading receipt.

5. In the matter of ***Sinclair Murray And Co. P. Ltd.*** (*supra*), an identical situation was again posed before the Supreme Court with a further submission that there was no provision in the Bengal Finance (Sales Tax) Act, 1941, under which the sales tax was realised by the appellant in that case corresponding to Sub.section-(3) of Section-9(B) of the Orissa Sales Tax Act, 1947. The Supreme Court rejected the contention and observed that the price at which the goods were sold to the purchaser, was inclusive of the sales tax and as such, the sale price, inclusive of the sales tax, would be the trade receipt in the hands of the trader. The Supreme Court,

relying upon the judgement in the matter of ***Chowringhee Sales Bureau*** (*supra*)**,** observed that the sales tax would be included in the trading receipt of the dealer and would become part of his income as the money realised from the purchaser on account of tax was employed by the dealer for the purpose of making profit and was not separated from price simpliciter. The Supreme Court further observed that the judgement in the matter of ***Chowringhee Sales Bureau*** (*supra*) would apply to the facts of the said case. While parting with the case, the Court observed that in the said case, if and when the said appellant pays the sum of Rs.7,14,398/- or any part thereof either to the State Government or to the purchaser, the said appellant would be entitled to claim deduction of the sum so paid.

6. In the matter of ***M/s.Mugat Dyeing & Printing Mills*** (*supra*), the Division Bench of this Court has observed that the words “actually paid” have been employed in Section 43-B of the Act, therefore, in view of the *non obstante* clause contained in Section 43-B, it would not be permissible to refer to the expression “paid”, as defined under Section-43(2) of the Act or under any provision of the Act. The Court further held that the words `actually paid' would mean really paid to

the coffers of the Revenue. According to us, a liability to pay would not mean payment.

7. In our opinion, the benefits flowing from Section 43-B of the Act would be available to the Assessee, a direction would be available to the Assessee in respect of any sum payable by the Assessee by way of tax or duty under any law for the time being in force or any sum payable by the Assessee as an employer by way of contribution to provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees, only if the same is actually paid by him. If the same is not paid and is kept apart in some different account, then, the same does not make any difference because the amount is still in the hands of the trader/Assessee.

8. The Assessee cannot be allowed to say that as there was a dispute about the liability to some extent, or to an extent absolute, therefore, on one side, it would recover the tax, keep with it, would not pay the same, but, still would be entitled to deduction under Section 43-B of the Act. In view of the above referred judgements, in our considered opinion, deduction under Section 43-B of the Act would be available to the

Assessee if it actually pays the sum.

9. In our opinion, the Tribunal was unjustified in observing that the provisions of Section 43-B of the Act would not attract, the Tribunal was also unjustified in observing that the excise duty recovered from the purchaser was kept with the Assessee as deposit. If the Assessee was of the opinion that under the circumstances, it was not required to recover any excise duty from any purchaser, then, it should not have recovered and should have felt content with bank guarantee in its favour, but, once it proposes to recover the tax or the excise duty, then, the said recovery would amount to trade receipt in its hand and it would not be entitled to exemption under Section 43-B of the Act if it does not actually pay the amount.

10. The Tribunal was unjustified in law and on facts in holding that the trader was entitled to the benefits under Section 43-B and not to be charged on the amount recovered under the head of excise duty. The Reference is answered in favour of the Revenue. The order passed by the Tribunal is set aside. The Reference stands allowed. No costs.

[***R.S.Garg, J.***]

[***D. H. Waghela, J.***]

*kamlesh**